terms of that Rule. The question is whether it should exercise its discretion. Given the circumstances affecting the cargo, I do not believe that it can be less beneficial to the defendants that the cargo be sold as soon as possible rather than to let it accrue heavy storage and other charges whilst it is going through the natural process of deterioration pending the trial of this action. The circumstances are the refusal or inability of the defendants to provide security and also the current legal impossibility of the cargo being delivered to the defendants by virtue of the Prohibition of Imports And Exports (Iraq) Order 1990 made on 21 August 1990 under the Control of Imports and Exports Act (Cap 56, 1985 Ed). There is no evidence when this prohibition order will be annulled.

For the above reasons, the defendants' application is dismissed with costs.

*Application dismissed.*

Solicitors: *Haridass Ho & Partners; Drew & Napier.*

Reported by *David Chong Gek Sian*

# 'The Ocean Jade'; Owners of the Ship or Vessel 'Ocean Jade' v Owners of Cargo lately laden on board the Ship or Vessel 'Ocean Jade'

HIGH COURT (SINGAPORE) — ADMIRALTY IN REM NO 442 OF 1990
KARTHIGESU J
27 FEBRUARY 1991

*Shipping and Navigation — Admiralty jurisdiction — Action in rem — Arrest of cargo to enforce shipowner's claim for freight — High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Ed), ss 3(1)(h) & 4(3) — Merchant Shipping Act (Cap 179, 1985 Ed), ss 263, 264, 266 & 267 — Rules of the Supreme Court 1970, O 41 r 5(1), (2), O 70 r 20(3) & (9)*

*Shipping and Navigation — Admiralty jurisdiction — Arrest of cargo to enforce shipowner's claim for freight — Vice-Admiralty Courts Act Amendment Act 1867 (30 & 31 Vict c 45), s 17 — Colonial Courts of Admiralty Act 1890 (53 & 54 Vict c 27) — High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Ed)*

*Civil Procedure — Admiralty — Jurisdiction — Arrest of cargo — Shipowner's claim for freight — Setting aside of writ and warrant of arrest*

*Civil Procedure — Admiralty — Jurisdiction — Arrest of cargo — Setting aside of default judgment — Rules of the Supreme Court 1970, O 41 r 5(1), (2), O 70 r 20(3) & (9)*

*Civil Procedure — Judgment in default of appearance — Affidavit filed as proof of plaintiffs' claim — Deponent of affidavit having no personal knowledge of facts and matters deposed — Rules of the Supreme Court 1970, O 41 r 5(1), (2), O 70 r 20(3) & (9)*

The plaintiffs were owners of the vessel which had carried a cargo of wood pulp from a port in the United States to the Persian Gulf and thence to Singapore. The defendants were owners of a cargo of wood pulp carried under bills of lading on board the plaintiffs' vessel. At the time when the cargo of wood pulp was loaded on board the plaintiffs' vessel, the vessel was time chartered to Meridien Shipping Incorporated. The cargo of wood pulp was to be delivered to the defendants at the Iraqi port of Um Qaser or Basrah. After the time charterer ran into financial difficulties and repudiated the charterparty, the plaintiffs took over the running of the vessel including the contracts of carriage entered into by the vessel during the currency of the charterparty.

As the vessel was about to proceed to discharge the defendants' cargo at Um Qaser/Basrah, Iraq invaded Kuwait. Imposition of economic sanctions against Iraq made it difficult for the plaintiffs' vessel to proceed to any Iraqi port. After making inquiries in 14 countries as to the possible discharge of the cargo of wood pulp in those countries, the plaintiffs carried the cargo to Singapore. At Singapore, the cargo was discharged into a warehouse and thereafter, the plaintiffs commenced an action in rem to enforce their claim for freight, extra expenses and return freight arising from the carriage and on-carriage of the cargo of wood pulp to Singapore. The plaintiffs caused the cargo of wood pulp to be arrested in the action. Thereafter, the plaintiffs obtained an order for the appraisal and sale of the cargo *pendente lite* and also obtained judgment in default of appearance in the admiralty action in rem.

The defendants applied by summons-in-chambers to set aside the judgment in default of appearance and all other proceedings connected with the plaintiffs' action in rem against the cargo including the writ in rem and the warrant of arrest. The defendants contended that the court had no jurisdiction to arrest cargo to enforce a shipowner's claim for freight. Additionally, the defendants contended that the judgment in default of appearance obtained by the plaintiffs was to be set aside as there had been non-compliance with the Rules of the Supreme Court 1970, in particular O 41 r 5(1) and (2) read with O 70 r 20(3).

**Held,** granting the defendants' application:

(1) The plaintiffs may invoke the admiralty jurisdiction of the High Court if the claim falls within s 3(1) and s 4 of the High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Ed).

(2) The plaintiffs do not have to prove at this stage of the proceedings that their claim for freight against the defendants was sustainable in law.

(3) On the assumption that the plaintiffs' claim fell within s 3(1)(h) of the High Court (Admiralty Jurisdiction) Act, the plaintiffs' claim for freight against the defendants was not frivolous or vexatious.

(4) The plaintiffs' claim for freight does not give rise to a maritime lien.

(5) In order to invoke the admiralty jurisdiction of the High Court by an action in rem against the cargo of wood pulp, the plaintiffs had to bring their case under the words 'or other charge on ... other property' in s 4(3) of the High Court (Admiralty Jurisdiction) Act.

(6) The words 'other charge' as used in the context of s 4(3) of the High Court (Admiralty Jurisdiction) Act do not have the wide meaning as 'any claim' or 'other claim'.

(7) The words 'other charge' as used in the context of s 4(3) of the High Court (Admiralty Jurisdiction) Act do not include a possessory lien. And as the plaintiffs' claim for freight merely gives rise to a possessory lien, the plaintiffs could not rely on s 4(3) of the High Court (Admiralty Jurisdiction) Act to arrest the cargo of wood pulp.

(8) The provisions in Part VII of the Merchant Shipping Act (Cap 179, 1985 Ed), in particular ss 263, 264, 266 and 267, do not create a charge over the cargo discharged from a ship and placed in the custody of a warehouseman or wharfinger. Section 263 of the Merchant Shipping Act preserves the shipowner's possessory lien for freight due on the cargo discharged from the ship.

(9) Historically, the High Court never had jurisdiction to proceed in rem against cargo to enforce the shipowner's claim for freight.

(10) Given the conduct of the plaintiffs, the court would not grant any equitable relief to the plaintiffs.

(11) As the court has no jurisdiction to arrest cargo to enforce the plaintiffs' claim for freight, the writ, warrant of arrest, the order for sale of the cargo of wood pulp and the judgment in default of appearance obtained by the plaintiffs in the action in rem to be set aside.

(12) The Rules of Court must be strictly observed. The plaintiffs have failed to comply with RSC 1970 O 41 r 5(1).

(13) A judgment in default of appearance in an admiralty action made under RSC 1970 O 70 r 20(3) is a final judgment.

(14) On the alternative ground that the plaintiffs have not proved their case as required by RSC 1970, O 70 r 20(3) and having regard to all the circumstances of the case including the fact that the defendants have shown in their affidavit that they have a good arguable case, the court would exercise its discretion to set aside the judgment in default of appearance obtained by the plaintiffs in the action in rem.

**Cases referred to:**

1 *'The St Merriel'* [1963] P 247 (folld)
2 *'The Sextum'* [1982] 2 Lloyd's Rep 532 (folld)
3 *'The St Elefterio'* [1957] P 179 (folld)
4 *'The Ripon City'* [1987] P 226 (refd)
5 *'The Acrux'* [1965] P 391 (folld)
6 *'The Halcyon Isle'* [1981] AC 221 (folld)
7 *Cargo Ex Argos* (1873-74) 5 LRPC 134 (refd)
8 *'The Kaleten'* [1914] 30 TLR 572 (distd)
9 *'The Struan'* 1985, H No 3152 Fol 324 (refd)
10 *In Re Fortitude* (1843) 2 W Rob 217 (refd)
11 *Place* v *Potts* (1855) HLC 383 (refd)
12 *Soon Aik Marine & Engineering Pte Ltd* v *'Hoesheng' (Owners of)* [1989] 1 MLJ 178 (refd)
13 *'The Conoco Britannia'* [1972] 2 QB 543 (refd)
14 *Rossage* v *Rossage* [1960] 1 All ER 600 (folld)
15 *Re J (an infant)* [1960] 1 All ER 603 (folld)

**Legislation referred to**

High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Ed) ss 3(1)(h), 4(3)
Rules of the Supreme Court 1970 O 41 r 5(1), (2), O 70 r 20(3), (9)
Administration of Justice Act 1920 (11 & 12 Geo 5, c 81) s 5
Admiralty Court Act 1861 (13 & 14 Vict c 26)
Colonial Courts of Admiralty Act 1890 (53 & 54 Vict c 26) s 2(2)
County Courts Admiralty Jurisdiction Amendment Act 1869 (32 & 33 Vict c 51)
Vice-Admiralty Courts Act 1863 (26 & 27 Vict c 24)
Vice-Admiralty Courts Act Amendment Act 1867 (30 & 31 Vict c 45)
Rules of the Supreme Court 1965 [UK] O 75 rr 20(3), 30, 32(2), 32(7), 33

*Ajaib Haridass* for the plaintiffs.
*Sin Lye Kuen* for the defendants.

*Cur Adv Vult*

**Karthigesu J:** State Enterprise for Paper Industries of Basrah, Iraq, the owners of cargo lately laden on board the ship or vessel 'Ocean Jade', the defendants in these admiralty proceedings, claim that this action and all proceedings in this action including the arrest of 'the cargo' (which comprised of 21,210 bales of bleached hard wood sulphate pulp and 4,637 rolls of unbleached kraft soft wood pulp) and the whole of the judgment in default of appearance dated 28 September 1990 be struck out or set aside.

I should state at the outset that Mr Haridass Ajaib, counsel for the plaintiffs, raised the question whether the defendants being a state corporation of Iraq had a right of audience. I indicated that Singapore was not in a state of war with Iraq. Furthermore, the action in the Gulf was in the nature of policing action undertaken by a coalition of countries under the auspices of the United

Nations. The point was not pursued by Mr Haridass Ajaib.

The grounds on which the defendants based their claim are stated in the summons-in-chambers itself under the following heads:

(1) that the court has no jurisdiction to entertain or otherwise deal with this action;
(2) that the action is unknown to the law of Singapore;
(3) that this action is an abuse of the process of the court;
(4) that the judgment in default of appearance entered by the plaintiffs, the owners of the 'Ocean Jade', was obtained improperly and irregularly, in that:
    (a) it purports to be based on an action over which the court has no jurisdiction;
    (b) it is and was obtained pursuant to an abuse of the process of the court;
    (c) the statement of claim was defective in that it:
        (i) discloses no or no reasonable cause of action against the cargo;
        (ii) is otherwise an abuse of the process of the court;
        (iii) that the warrant of arrest was obtained improperly;
        (vi) that the affidavit leading to the warrant of arrest was improper and misleading.

The 'Ocean Jade', a Panamanian registered vessel, is owned by Emilia Shipping Inc of Monrovia, Liberia ('the plaintiffs'). The plaintiffs by a time charterparty dated at Hamburg 17 May 1990 chartered the 'Ocean Jade' to Meridian Ship Inc of Baltimore, United States of America (the charterers') on a one-time-charter-trip from 'US Gulf/Mediterranean/Read Sea (Agaba) to Persian Gulf' of a duration of 70 to 75 days commencing from the time of delivery.

One of the shippers of cargo on the 'Ocean Jade' was Pinecell Inc of 14 Maple Street, Port Washington, New York, United States of America ('Pinecell') to whom was issued a bill of lading dated at New Orleans, 31 May 1990 and signed by the charterers' agents on behalf of the charterers. The bill of lading gave the details of the cargo which was consigned to the order of Rafidain Bank, Baghdad and named the defendants, State Enterprise for Paper Industries, Basrah as the 'notify party'. The port of discharge was stated as Um Qaser/Basrah. The bill of lading also stated that freight was prepaid and particulars thereof were given.

On or about 9 July 1990 and after the 'Ocean Jade's' voyage under the charterparty had commenced the plaintiffs learnt that the charterers would not make any further payments towards charterhire. In fact the charterers did not and were not thus in default of the payment of charterhire which breach the plaintiffs accepted as an abandonment of the charterparty and the voyage by the charterers. Nevertheless the plaintiffs were prepared to complete the voyage undertaken by the 'Ocean Jade' and duly deliver the cargoes consigned by the various shippers if the shippers would pay additional freight to the plaintiffs. All the shippers except Pinecell agreed and did pay additional freight to the plaintiffs.

Accordingly, the plaintiffs continued the voyage already undertaken by the 'Ocean Jade' under the charterparty. At the beginning of August the 'Ocean Jade' had delivered all the cargoes shipped aboard her except for the cargo shipped by Pinecell. Her last port of discharge was Damman in the Persian Gulf and she was proceeding to Um Qaser/Basrah, when on 2 August 1990 Iraq invaded Kuwait. This was followed by the United Nations resolution on 7 August 1990 to impose an embargo on all trade to and from Iraq.

The plaintiffs then decided that it would not be safe for the 'Ocean Jade' to make for Um Qaser or Basrah. The plaintiffs through their London solicitors Holman Fenwick and Willan ('Holman'), communicated with the defendants by telex from 9 August 1990 onwards. I must make extensive reference to this exchange of telexes between Holman and the defendants as on the one hand the plaintiffs have contended that the defendants 'were fully aware of the cargo situation since 9 August 1990' whilst the defendants contend that they received no notice whatsoever from the plaintiffs of the carriage of their cargo from Damman to Singapore or of any of the legal proceedings taken against the cargo.

I would summarize these telexes which were exhibited by the plaintiffs (affidavit of Norio Minami filed on 26 November 1990) as follows:

| | |
|---|---|
| 9 August 1990 | Holman unable to make direct contact with the defendants, telex Rafidain Bank and request that defendants to be informed that 'Ocean Jade' cannot proceed to Um Qaser or Basrah due to the Gulf crisis and the United Nations resolution on trade embargo with Iraq. Plaintiffs are forced to discharge the cargo at another safe and convenient port and are making inquiries for a suitable port of discharge. In the meantime the defendants are informed of the substantial extra services that will be rendered to the cargo which will entitle the plaintiffs to compensation. |
| 13 August 1990 | The defendants request the plaintiffs through Holman to discharge the cargo at Aqaba and inquire what the extra freight charges will be on c&f basis to a new consignee in Aqaba. |

| | |
|---|---|
| 14 August 1980 | Plaintiffs through Holman refuse to go to Aqaba and give the reason that it would be illegal in view of the United Nations' embargo. Furthermore additional war risks premiums necessary to go to Aqaba. |
| 16 August 1990 | Defendants again request that 'Ocean Jade' discharge the cargo at Aqaba but if this is not possible suggest Tunis or Libya. |
| 19 August 1990 | Getting no response from the plaintiffs, defendants request discharge of the cargo in one of the Al-Yamen ports. They also repeat their telex of 16 August 1990. |
| 20 August 1990 | Plaintiffs through Holman refuse to accept the destinations suggested by the defendants on the grounds that it would 'expose the owners and/or cargo to risk and danger since it would be illegal' and add that the plaintiffs are finding difficulty in locating any safe and convenient port with available storage but will revert. |
| 28 August 1990 | Not having heard further from the plaintiffs, the defendants seek information as to the present whereabouts of the 'Ocean Jade' and request to know her destination to enable them to follow up matters regarding the cargo. |
| 28 August 1990 | The plaintiffs through Holman inform the defendants that the cargo has been discharged and placed in storage at Singapore. The defendants are further informed that the plaintiffs will apply to the Singapore courts for directions in relation to the cargo. |

I must pause here to observe that the plaintiffs had directed the master of the 'Ocean Jade' to make for Singapore on 7 August 1990, that the 'Ocean Jade' arrived in Singapore on 20 August 1990 and by 28 August, if not before, had discharged the cargo into a warehouse at Sembawang Terminal, Deptford Road, Singapore, a PSA warehouse and in the plaintiffs' possession; that the writ in rem in these proceedings was filed on 27 August 1990 and the cargo arrested in these proceedings on 29 August 1990. These facts are deposed to by Mr Haridass Ajaib, the solicitor acting for the plaintiffs who made his affidavits filed on 29 August 1990 and 31 August 1990 on the information and based on the documents and instructions given to him by one Hugh Jonathan Livingstone, a partner in Holman. I can only conclude that the plaintiffs were being less than forthright with the defendants in giving out information regarding the movement of the 'Ocean Jade' and the defendants' cargo and puts in doubt their professed honest and legitimate intentions.

After the issue of the writ in rem on 27 August and the arrest of the cargo on 29 August the plaintiffs proceeded in extreme haste as is evident from their application for the appraisal and sale of the cargo *pendente lite* made on 30 August 1990. An order was made on 14 September 1990 but I was informed that although the Sheriff has a firm offer in hand the sale will not be proceeded with pending a decision on the defendants' application herein. The statement of claim was filed on 25 September 1990 and the court moved for a judgment in default of appearance pursuant to O 70 r 20(3) of the Rules of the Supreme Court 1970 on 28 September 1990.

Judgment was duly entered on 5 October 1990 as follows:

(i) that the defendants pay the plaintiffs the sum of US$1,258,409.73;

(ii) that the plaintiffs be paid out of the proceeds of sale of the cargo all storage expenses at Sembawang Terminal (PSA) from 20 August 1990 to 29 August 1990;

(iii) that the costs of this action including the costs of the motion for judgment be taxed and paid out of the proceeds of sale of the cargo to the plaintiffs' solicitors.

The plaintiffs' claim as formulated in the statement of claim is for freight, extra expenses and return freight and for extra services rendered to the cargo which are claimed as reasonable compensation pursuant to cl 16(d) of the bill of lading (para 12 of the statement of claim).

Further or alternatively the same claim is made as the loss and damage suffered due to the defendants' failure to pay the like amount in breach of cl 16(d) of the bill of lading (para 13 of the statement of claim).

Further or alternatively the claim is made for freight and/or expenses in the like amount as carriers and bailees of the cargo at common law (para 14 of the statement of claim).

Further or alternatively the claim is made in the like amount as reasonable remuneration for the services the plaintiffs had rendered to the defendants in connection with the cargo in the circumstances of the facts I have set out earlier in this judgment (para 15 of the statement of claim).

The particulars of the claim for freight, extra expenses and return freight and for extra services rendered to the cargo are given in the appendix attached to the statement of claim and quantified in the sum of US$1,257,735.07 which was amended to US$1,258,409.73 for which judgment was entered.

Lastly and in the alternative to the claim as formulated above the plaintiffs claimed US$931,685.56 as hire and expenses incurred by them as bailees of the defendants' cargo on the terms of the charterparty (para 20 of the statement of claim).

I shall deal first with the jurisdiction point taken by Mr Sin Lye Kuen, counsel for the defendants. His argument was that in order to invoke the admiralty jurisdiction vested in this court by the High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Ed) ('the Act'), a plaintiff must not only classify his claim under one or other of the items of claim (a) to (r) of s 3(1) of the Act but must also comply with one of the subsections of s 4. If he failed to do this and could only classify his claim under a provision of s 3(1) of the Act but could not at the same time bring himself within sub-ss (1),(2),(3) or (4) of s 4 then the court would be lacking in jurisdiction, that is to say, that the court would not have the authority to decide the matter brought before it in a formal way for its decision. See para 715 of 10 *Halsbury's Laws of England* (4th Ed).

In my view Mr Sin's argument is manifestly correct and is supported by authority. See *'The St Merriel'*,[1] *'The Sextum'*[2] and *'The St Elefterio'*.[3]

The plaintiffs' claim, Mr Sin contended, could only come (if at all) under s 3(1)(h) of the Act which reads as follows:

> 3(1) The admiralty jurisdiction of the High Court shall be as follows, that is to say, jurisdiction to hear and determine any of the following questions or claims: ...
>
> (h) any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship.

Mr Haridass Ajaib conceded this. See para 24 of his affidavit filed on 28 August 1990 in support of the application for the warrant for the arrest of the cargo. The claim which is for freight, extra expenses and return freight and for extra services rendered to the cargo and which is brought in rem against the cargo, Mr Sin further contended, does not come within any of the relevant subsections of s 4 and accordingly the admiralty in rem jurisdiction of this court in these proceedings has been wrongly invoked by the plaintiffs.

Mr Sin then pointed out that the plaintiffs had not complied with any one of the four essential requirements of s 4 of the Act which are provided in sub-ss (1), (2), (3) and (4). He submitted that sub-s (1) was inapplicable as that provision dealt with invoking the in personam admiralty jurisdiction of this court. However the plaintiffs were seeking to invoke the in rem jurisdiction. Subsection (2) was also not applicable as that subsection dealt with claims which are classified under s 3 (1)(a) to (c) and (r). The plaintiffs' claim could not be classified under any one of them. So also sub-s (4) was not applicable as that subsection related to an action in rem against a ship. The plaintiffs' claim was not against the 'Ocean Jade' but against the cargo lately laden on board the ship or vessel 'Ocean Jade', that is to say against the cargo.

In anticipation of what might be argued by the plaintiffs, Mr Sin dealt more extensively with s 4(3) of the Act. This subsection reads as follows:

> In any case in which there is a maritime lien or *other charge on any* ship, aircraft or *other property for the amount claimed, the admiralty jurisdiction of the Court may be invoked by an action in rem against that* ship, aircraft or *property*. (Emphasis added.)

Mr Sin argued that the plaintiffs' claim for freight, extra expenses and return freight and for extra services rendered to the cargo could not give rise to a maritime lien on the cargo and further submitted that it was now well settled by authority that the categories of claims that give rise to a maritime lien are closed and any extension of the categories of claims can only be achieved by legislation. He referred me to *'The Ripon City'*[4] for a general discussion on the historical foundation of maritime liens and to *'The Acrux'*[5] at p 403 for his latter submission. I would, however, refer to the judgment of Lord Diplock delivering the judgment of the majority of the Law Lords at the Privy council in *Bankers Trust International Ltd* v *Todd Shipyards Corp* (*'The Halcyon Isle'*)[6] where both these aspects are discussed although Mr Haridass Ajaib does not dispute these propositions. I feel that reference to the judgment of Lord Diplock will serve a useful purpose in trying to understand Mr Haridass Ajaib's rather complex and convoluted arguments in opposing this application.

At pp 231G to 233G of the judgment Lord Diplock said:

> In the case of claimants to a limited fund consisting of the proceeds of sale of a ship in action in rem brought in a court which, like the High Court of Singapore, applies English admiralty law and practice, the problem of classifying foreign maritime claims for the purposes of determining priorities is complicated by the legal concept of 'maritime lien' to which some classes of maritime claims against a shipowner give rise in English law while other classes do not. This concept derived as it is from civil law and not the common law may fairly be described as sui generis.
>
> The classic description of a maritime lien in English law is to be found in *Harmer* v *Bell* (*'The Bold Buccleugh'*) (1851) 7 Moo PCC 267, a case decided by the Privy Council at a time when the English Court of Admiralty regarded itself as applying not so much English law as the 'general law of the sea of the whole of Europe.' Sir John Jervis described (at p 284) the concept as having its origin in the civil law. He adopted as correct Lord Tenterden's definition of 'maritime lien' in *Abbot on Shipping*, as meaning '... a claim or privilege upon a thing to be carried into effect by legal process' and Sir John Jervis added:
>
> 'This claim or privilege travels with the thing, into whosesoever possession it may come. It is inchoate from the

moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding in rem, relates back to the period when it first attached.'

The expression 'privilege' in this description of a maritime lien is a reference to the concept of 'privilege' in the civil law from which the French Code Civil is derived. There, privilege is used in the sense of the right of a creditor of a particular class to be paid out of a particular fund or the proceeds of sale of a particular thing in priority to other classes of creditors of the owner or former owner of the fund or thing. In the French Code Civil it is distinguished from the concept of 'hypotheque' which was the subject of detailed analysis by the English Court of Appeal in '*The Colorado*' [1932] P 102.

Sir John Jervis, speaking in 1851, said that a maritime lien existed in every case in which the Court of Admiralty had jurisdiction to entertain an action in rem against a ship. Jurisdiction in rem and maritime lien went hand in hand. This had been true when the jurisdiction of the Court of Admiralty was at its lowest ebb in the early years of the 19th century as a result of harassment by the courts of common law. It has remained true in the law of the United States of America where today all maritime claims enforceable in rem are treated as giving rise to maritime liens; but it was no longer true in English law, even by 1851, after the jurisdiction of the Court of Admiralty had been extended by the Admiralty Court Act 1840 and the Merchant Shipping Act 1844. Subsequent extension of jurisdiction in rem in respect of maritime claims were made by the Admiralty Court Act 1861 and by later Merchant Shipping Acts until its modern jurisdiction was laid down in the Administration of Justice Act 1956, which is in the same terms as the High Court (Admiralty Jurisdiction) Act, of Singapore.

During the period that the English Court of Admiralty regarded itself as applying the 'general law of the sea' four classes of claims only were treated as giving rise to maritime liens of ships, viz (1) salvage; (2) collision damage; (3) seaman's wages; and (4) bottomry. Bottomry is now obsolete, but historically it provided a normal means of providing security for the price of goods and services supplied to a ship by necessaries men outside its home port. Two additional classes of claims were added to this list by statute in the 19th century. These were (5) master's wages, and (6) master's disbursements. The ranking for the purpose of priority in the distribution of a limited fund that has been accorded by the English Court of Admiralty to claims within the various classes that were treated as giving rise to maritime liens was complicated. It still is. It can be found conveniently set out in *British Shipping Laws* (1st Ed) vol 1 (1964), paras 1574 et seq that deals with admiralty practice. For present purposes it is sufficient to observe that the priorities, whether between class and class or within one class, bear no relation to the general rule applicable to other charges upon property as security for a debt: *qui prior est tempori potior est jure*. This rule is based upon the principle that when the owner of a thing grants a charge on it as security for the payment of a sum of money, he transfers to the grantee part of his own proprietary rights in the thing and so deprives himself of the ability to transfer to a subsequent grantee anything more than such proprietary rights as remain to him.

This principle, based as it is upon the concept of a transfer of proprietary rights, cannot explain the priorities accorded to maritime liens. Indeed a later maritime lien for one class of claim may rank in priority to an earlier maritime lien for another class of claim, and even within a single class a later maritime lien may rank in priority to an earlier one.

Thus when Gorell Barnes J in '*The Ripon City*' [1897] P 226, 242 said of a maritime lien:

> 'It is a right acquired by one over a thing belonging to another a *jus in re aliena*. It is, so to speak, a subtraction from the absolute property of the owner in the thing,'
>
> the second sentence is inaccurate if it is to be regarded as suggesting that the owner of a ship, once it has become the subject of a maritime lien, can no longer create a charge on the whole property in the ship which will rank in priority to the existing lien. This he can do — as for instance by entering into a salvage contract or by signing on a crew.
>
> In English admiralty law and practice claims of all those six classes that have hitherto been treated as giving rise to a maritime lien take priority over claims under mortgages in the distribution of a limited fund by the court, and mortgages themselves rank in priority to all classes of claims that have not been treated as giving rise to a maritime lien.

And at p 236 he said:

> The statutory extensions by the Admiralty Court Acts 1840 and 1861 of the jurisdiction of the English Court of Admiralty to entertain actions in rem against ships in respect of claims of most of the kinds now listed in the current Singapore and English statutes, including claims by necessaries men, might have been regarded as entitling these new claims to maritime liens. Under admiralty practice as it then existed this would have given to them priority over mortgagees to which the necessaries men in the instant case would be entitled under United States law. After some early vacillation by Dr Lushington, however, it was decided by the Privy Council in *Johnson* v *Black* ('*The Two Ellens*') (1872) LR 4 PC 161, that those English statutes did not create a maritime lien for any of the additional classes of claims over which the court of admiralty had newly been granted jurisdiction, and that accordingly, mortgagees had priorities over necessaries men: see also '*The Pacific*' (1864) Brown & Lush 243. *It required an express provision of an English statute to create a maritime lien for classes of claims other than those entitled to such liens under what the Court of Admiralty regarded and referred to as the 'general law of the seas'* (emphases added). This was done in the case of masters' wages by the Merchant Shipping Act 1854, '*The Salacia*' (1862) Lush 545, and in the case of masters' disbursements by the Merchant Shipping Act 1889 after the House of Lords in *Hamilton* v *Baker* ('*The Sara*') (1889) 14 App Cas 209 had held that the earlier statues conferred no such lien.

Mr Sin further argued that what the plaintiffs had in this case, if their claim was well founded, was a possessory lien over the cargo for freight, extra expenses and return freight and for extra services rendered to the cargo. The question was whether such a possessory lien could amount to a 'charge on ... property for the amount claimed' within the meaning of s 4(3) of the Act. This question he submitted was answered in the negative by Hewson J in '*The St Merriel*'[1] and in '*The Acrux*'.[5] I shall have to return to this question later but for the present let me say that I accept the judgment of Hewson J in '*The St Merriel*'[1] that not only must s 4(3) of the Act (he was dealing with the pari materia provision in the Eng-

lish Administration of Justice Act 1956) be strictly construed but also that the words 'other charge' do not bear a more extended meaning than the words 'charge upon the ship' in the Merchant Shipping Act, and do not include a possessory lien.

Accordingly Mr Sin submitted that the plaintiffs' claim against the cargo could not be brought within s 4(3) of the Act as well and thus the Admiralty Jurisdiction of this court could not be invoked by the plaintiffs by an action in rem against the cargo.

Once again I must say that in my view Mr Sin's argument is manifestly correct and supported by authority. He rounded off his argument on the jurisdictional aspect of the defendants' application by giving me instances when *cargo* may be arrested by reference to *British Shipping Laws* Vol 14 'Maritime Liens' by DR Thomas (1980 Ed) at p 27 para 37. These he summarized as follows:

(a) In a claim giving rise to *bottomry maritime lien*, the ship, freight and *cargo* may be proceeded against in an action in rem.
(b) In a claim giving rise to a *damage maritime lien*, the ship and freight (ie the *cargo* on which the freight is earned) may be proceeded against by an action in rem.
(c) In a claim giving rise to a *salvage maritime lien* the ship, freight, *cargo*, flotsam, jetsam, lagan, derelict and wreck may be proceeded against by an action in rem.
(d) In a claim giving rise to *wages and disbursement maritime lien*, the ship and freight (ie the *cargo* on which the freight is earned) may be proceeded against in an action in rem.

to show that the plaintiffs' claim does not give rise to any maritime lien to enable the plaintiffs to proceed against the cargo by an action in rem. He also referred me to the case of *Cargo ex Argos*[7] to which I will refer later in this judgment.

The defendants' case simply put is that the plaintiffs' claim even if it is a claim which can be classified under s 3(1)(h) of the Act does not fulfil any one of the essential requirements of s 4(2), (3) or (4) and accordingly the plaintiffs have wrongly invoked the admiralty in rem jurisdiction of this court.

Mr Haridass Ajaib presented his arguments in opposition to the defendants' application under three broad heads. Firstly he argued that apart from the jurisdiction vested in this court by the Act there was a 'residual' or 'inherent' jurisdiction carried over from the admiralty jurisdiction exercised by this court before the Act became law on 15 January 1962 under which the plaintiffs' claim could be brought in rem before this court. I shall call this argument 'the historical argument'. Secondly he argued that the plaintiffs' claim was rightly classified under s 3(1)(h) of the Act and complied with s 4(3) as the words 'other charge over property' would include a charge over cargo by way of a lien for freight. The court should construe these words liberally. I shall refer to this argument as the 'jurisdiction under the Act argument'. Finally he argued that there was an equitable jurisdiction on which the plaintiffs could rely in support of the right to arrest cargo for freight. I shall refer to this argument as the 'equitable jurisdiction argument'.

'The historical argument' is premissed firstly on the argument that the admiralty court in England acted only in rem and on the further premiss that under the admiralty court's original jurisdiction there was always a right to proceed in rem against cargo for freight. For the latter proposition Mr Haridass Ajaib referred me to '*The Kaleten.*'[8]

It will be noted from the part of the judgment of Lord Diplock in '*The Halcyon Isle*'[6] to which I have referred to earlier and from the brief reference he made to Sir John Jervis, speaking in 1851, that historically the court of admiralty entertained an action in rem against a ship in every case where a maritime lien existed. Jurisdiction in rem and maritime lien went hand in hand. In that same judgment Lord Diplock pointed out that during the period the English court of admiralty regarded itself as applying the general law of the sea only four classes of claims were treated as giving rise to maritime liens on ships, namely, salvage, collision, seaman's wages and bottomry bond. Two other maritime liens were added to the list, viz master's wages and master's disbursements by statute in 1854 and 1898 respectively.

Thus, it seems to me that until the Admiralty Court Act 1861, the admiralty court's jurisdiction to entertain an action in rem was co-extensive with a maritime lien and was limited to the maritime liens I have referred to above save for the maritime lien arising from master's disbursements. The Admiralty Court Act 1861 extended the classes of claims which may be brought in rem before the High Court of Admiralty but it did not classify those claims as maritime liens. It should be noted that the claims that could be brought in rem by the Admiralty Court Act 1861 did not include a claim for the freight due on cargo. It was not until The Administration of Justice Act 1920 that it was possible to bring such a claim in rem. Section 5 of the Administration of Justice Act 1920 provided as follows:

> (1) The Admiralty jurisdiction of the High Court shall, subject to the provisions of this section, extend to —
>
> (a) any claim arising out of an agreement relating to the use or hire of a ship; and
> (b) any claim relating to the carriage of goods in any ship; and

(c) any claim in tort in respect of goods carried in any ship:

...

(2) The jurisdiction conferred by this section may be exercised either in proceedings in rem or in proceedings in personam.

Mr Haridass Ajaib's argument that under the admiralty court's original jurisdiction there was always a right to proceed in rem against cargo for freight is specious and without substance. Further the case of '*The Kaleten*'[8] he cited to me in support of this proposition does not bear him out. A careful reading of the report of this case will show that the plaintiffs' claim was not a claim for the unpaid freight on the cargo *but that it was a claim for £500 for necessaries supplied to the Kaleten at Copenhagen.* A claim for necessaries supplied to a ship could be brought in rem by reason of s 5 of the Admiralty Court Act 1861 which provided that 'the High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which she belongs ....' After leaving Copenhagen the Kaleten sailed to Casablanca, and when near that port went ashore and became a wreck, but a portion of her cargo, which consisted of timber, was saved and duly arrived in Morocco, and freight to the amount of £195 6s 6d became payable in respect of it. This sum was duly paid to the managing agents of the Kaleten and was held by them in an account at the London County and Westminster Bank. The plaintiff applied to the admiralty division for a warrant to arrest the freight. *In support of this application an affidavit was filed which stated that the plaintiff had supplied necessaries, and in respect thereof the master had given a promissory note, and that the owner or part owner was resident within the jurisdiction of the court.* One of the questions for the court was whether a warrant of arrest could issue against the freight without a warrant of arrest against the ship and/or the cargo. It was in that connection that the learned President of the court said what Mr Haridass Ajaib relies on. He said:

> The ordinary way of arresting freight was by executing the warrant of arrest on the cargo itself. In Coote's *Admiralty Practice* (1860 Ed) pp 14 and 15, the arrest of freight was dealt with. 'Cargo may not only be arrested ex nomine, but also in respect of freight. For if freight has been earned the cargo is held to represent it so long as it remains unpaid by its consignees, and the same remark applies to what is analogous to freight, namely, where the cargo belongs to the owner of the ship, and there will be a profit realized on its sale.

In the event the court concluded that a warrant could not issue against freight separate from ship and cargo or ship or cargo.

It is clear beyond peradventure that '*The Kaleten*'[8] is a case of a claim *for necessaries* where the plaintiff sought to proceed against the freight which he could properly have done by arresting the cargo had the freight not been paid. It is by no means authority for the proposition that a claim for freight could be brought in rem by arresting the cargo.

Mr Haridass Ajaib also referred me to p 617 of Williams & Bruce on the *Jurisdiction and Practice of the English Courts in Admiralty Actions and Appeals* (3rd Ed) where the case of '*The Struan*'[9] is noted, as further authority for the proposition that there always was a right to proceed in rem against cargo for freight. The notation reads as follows:

> Upon hearing counsel for the plaintiffs and P & Sons, solicitors for WM & Sons, it is ordered that the said WM & Sons do forthwith pay into court to the credit of this action the balance, verified by affidavit, of freight, now in their hands, due for the transportation of the cargo now or lately laden on board the vessel Struan, after deducting the expense of paying in the same.

It is far from clear to me that the claim in '*The Struan*'[9] was for freight. One is left guessing as to what the claim was. Was it for one of the five maritime liens that the admiralty court recognized at that time? One does not really know. It is pointless to cite '*The Struan*'[9] as authority for any proposition at all.

I have earlier referred to the case of *Cargo ex Argos.*[7] It was cited by Mr Sin to show that the case decided under the County Courts Admiralty Jurisdiction Act 1869 should be seen in the light of the admiralty jurisdiction given to the county courts in England which jurisdiction was then not available to the High Court of Admiralty exercising jurisdiction under the Admiralty Court Act 1861. It created a special and an anomalous situation. Mr Haridass Ajaib cited it to demonstrate that the jurisdiction given to a county court to exercise an in rem jurisdiction over a 'claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship' although limited to claims which did not exceed three hundred pounds even though the High Court of Admiralty did not at that time have any similar jurisdiction must be seen as recognition by the English Parliament that historically there was a right to proceed in rem in the admiralty court, against cargo for unpaid freight.

I have attempted to show that historically there was no such right as Mr Haridass Ajaib claims. The two cases he referred me to do not admit of any such right. One would have thought that if there was such right it would have been clearly enunciated or recognized in some decided cases. There is none.

The jurisdiction given to the county courts by The County Courts Admiralty Jurisdiction Act 1869 was simply a creature of statute and has no basis or foundation in the so called historical jurisdiction exercised by the court of admiralty during its development in the early years of the 19th century. This I think is clear from

the judgment of the Privy Council delivered by Sir Montague E Smith at pp 150 and 153 of the report. He said at p 150:

> It cannot be denied that it was intended by the Act of 1869 to give the county courts some new jurisdiction over claims arising out of agreements between shipowners and mechanics beyond that bestowed on them by the Act of 1868, which gave jurisdiction only over 'any claim for damage to cargo', but it was contended for the respondents that these last words, not being sufficiently large to include all the jurisdiction given to the court of admiralty by the Admiralty Court Act 1861, in favour of the owners of cargo, the Act of 1869 was passed merely to supply this deficiency. If this were really meant to be the limited scope of the second Act, it is reasonable to suppose that the language of the Admiralty Court Act 1861, would have been followed, or at all events that some words, would have been used to indicate this limited intention. It seems scarcely conceivable, if the only object of the County Court Act of 1869 had been to give the county courts so much of the partial and limited jurisdiction of the Admiralty Court Act 1861, as had not been included with the Act of 1868, and no more, that the wide language actually found in it should have been employed — language which describes with accuracy entirely new heads of claims, namely, those arising from agreements relating to the use and hire of ships, and claims by shipowners in relation to the carriage of goods, which had no place in the Admiralty Court Act 1861.

And at p 153:

> The legislature, having regard to the convenience of speedy remedy and decision when witnesses were on the spot and available, may have considered that the county courts, which in maritime districts were appointed to have admiralty jurisdiction, and which under the first statute possessed a partial jurisdiction over mercantile agreements relating to cargo, might be entrusted to determine, with the aid of mercantile assessors, other mercantile and maritime causes relating to charterparties, bills of lading, and similar agreements up to the value of £300; and they may further have thought that, as these county courts were invested with Admiralty procedure, the new causes should be dealt with as admiralty causes, and the appeal should go to the court of admiralty. If such really was the intention of the legislature, however it may be regretted by those who value the symmetry of legal procedure, it has certainly used apt, precise and unambiguous words to define the new causes it meant to add: and their Lordships find themselves unable to affirm that the legislature did not mean what it has plainly said.

From as far back as 23 October 1837 the Court of Jurisdiction of the Straits Settlements, of which Singapore was a part, has exercised or at least was in a position to exercise admiralty jurisdiction, for we find in the Letter's Patent for Reconstituting the Court of Judicature of Prince of Wales' Island (Penang), Singapore and Malacca dated 10 August 1855 (The Third Charter) the following:

> This Charter was ratified and confirmed by an Act of Parliament, passed in the 18th and 19th year of the reign of Queen Victoria, Cap 93, and is dated the 12th day of August, in the 19th year of the reign of Victoria (1855).
>
> The Preamble recites that the East India Company, under powers granted by 6 Geo IV, c 85 s 21, united Singapore and Malacca to Prince of Wales Island, to be an incorporated Settlement & c, that the late King Geo IV, under authority of sec 19 of same Act, issued Letters Patent, dated 27th of November, in the 7th year of his reign (1826), constituting a Court of Judicature for the said Settlement; that the late King, William IV, by Letters Patent, dated 25th of February, in the 7th year of his reign (1837) under authority of 6 and 7 Will IV c 53, granted Admiralty jurisdiction to the said court; that since the granting of the above Letters Patent the population and commerce of Singapore have greatly increased, making it desirable that there should be a resident professional Judge for that station.
>
> The Letters Patent dated 25th February 1837 was duly proclaimed in open court on the 23rd October 1837. See page lxxix of *Cases Heard and Determined in Her Majesty's Supreme Court of the Straits Settlement 1804-1884*, edited and reported with a Judicial Historical preface from 1786 to 1885 by James William Norton Kyshe Vol 1.

The Court of Judicature exercising admiralty jurisdiction in the Straits Settlements was given the status of a vice-admiralty court by s 17 of the Vice-Admiralty Courts Act Amendment Act 1867 which provided that the Vice-Admiralty Courts Act 1863 shall together with the Vice-Admiralty Courts Act Amendment Act apply to any vice-admiralty courts now established or hereinafter to be established in the Straits Settlements.

Although courts to exercise admiralty jurisdiction were established in the Straits Settlements it is not clear to what extent they exercised the admiralty jurisdiction of the court of admiralty in England. The Act of Will IV c 53 referred to in The Third Charter refers to the 'Exercise of Admiralty jurisdiction to the same extent in all respects of His Majesty's Supreme Court of Judicature at Fort William in Bengal (Calcutta) is now by virtue of any Charter or Acts of Parliament authorized to exercise any Admiralty jurisdiction.'

It was only with the enactment of the Colonial Courts of Admiralty Act 1890 that the extent of the exercise of admiralty jurisdiction by a Colonial Court of Admiralty becomes clear. This Act repealed the Vice-Admiralty Courts Act 1863 and the Vice-Admiralty Courts Act Amendment Act 1867 and by s 2(2) provided that the jurisdiction of a Colonial Court of Admiralty shall (be) the admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise. In my view this is as clear as any statement could be that the admiralty jurisdiction was derived from the Admiralty Courts Act 1861, being the statute from which the High Court in England derived its admiralty jurisdiction in 1890. This is acknowledged by RG Van Someren in his annotation to s 5(c)(i) of the Civil Procedure Code (Ordinance 102) (3rd Ed), by GS Carver at p 212.

It is accepted that this court's admiralty jurisdiction before the Act became law on 15 January 1962 was

derived from the Colonial Courts of Admiralty Act 1890. That jurisdiction as I have already stated is that contained in the Admiralty Courts Act 1861, but Mr Haridass Ajaib sought to persuade me that the words 'or otherwise' and the words 'and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations' in s 2(2) of the Colonial Courts of Admiralty Act 1890 were intended to mean that any jurisdiction not conferred by statute but which existed and was exercised by the early 19th century courts of admiralty could be assumed by the Colonial Courts of Admiralty. So also he argued that the words 'together with any other jurisdiction connected with ships or aircraft which may be vested in the Court apart from this Section' at the end of s 3(1) of the Act meant that any jurisdiction not conferred by the Act but which existed and was exercised by this court exercising jurisdiction under the Colonial Courts of Admiralty Act should be assumed by this court.

He further argued by reference to r 20(a) of Rules of Court made in pursuance of the Colonial Courts of Admiralty Act 1890, for regulating the procedure and practice in admiralty courts in the Supreme Court of the Straits Settlements (see RG Van Someren's annotation of Ordinance No 101 (Courts) (3rd Ed) by GS Carver at pp 124 to 131) that the framing of the rule clearly acknowledged the existence of a right to proceed in rem in respect of freight claims for cargo. The rule reads as follows:

> 20 A release may also be issued by the Registrar unless there is a caveat outstanding against the release of the property —
>
> (a) on payment into Court of the amount claimed or of the appraised value of the property arrested or where cargo is arrested for freight only of the amount of freight verified by affidavit.

In my view this is a tenuous argument not worthy of consideration. I think I have shown that apart from the County Court Admiralty Jurisdiction Act 1869 and until the Administration of Justice Act 1920, no admiralty court in England had jurisdiction to proceed in rem against cargo for unpaid freight. I know of no rule of law of proving a substantive right by reference to a practice rule. In any case in my view the arguments for saying that apart from statute there always was a right in admiralty to proceed in rem against cargo for unpaid freight is far outweighed by the arguments against it. As I have said it is much too tenuous an argument to base the existence of such a right on a practice rule which in all probability was engendered by the case of the *Cargo ex Argos*.[7]

Apart from the foregoing considerations it should be pointed out that Dr Lushington, perhaps the greatest authority in admiralty law and practice of his time, declared in *In re Fortitude*[10] that the Court of Admiralty did not have jurisdiction to hear a suit for title to freight where there were no other justiciable issues that fell within the jurisdiction of the admiralty court. However the House of Lords in *Place* v *Potts*[11] decided that the Court of Admiralty did have jurisdiction to hear a claim for freight. (See n 33 on p 335 of *Maritime Liens and Claims* by William Tetley.)

Thus Mr Haridass Ajaib's 'historical argument' fails.

'The jurisdiction under the Act argument'. This argument was premissed on the contention that the plaintiffs had a right under the court's 'inherent' or 'residual' jurisdiction to arrest cargo for unpaid freight or alternatively that the plaintiffs' claim came within s 3(1)(h) of the Act.

There are two obstacles which the plaintiffs must still overcome to be able to invoke the in rem admiralty jurisdiction of this court under the Act. They are whether a shipowner can arrest the cargo carried in his ship for unpaid freight *and* if he could whether the claim could be brought under provisions of s 4(3) of the Act to enable the in rem jurisdiction of this court to be invoked against the cargo. It is agreed by both sides that only s 4(3) of the Act is relevant in this case.

Mr Haridass Ajaib approached this question firstly by arguing that there always was an in rem jurisdiction exercised by the Court of Admiralty to arrest cargo for unpaid freight which was saved by the concluding words of s 3(1) of the Act which he called 'the sweeping up provision'. I have already dealt with this argument under 'the historical argument'. I have not been persuaded that apart from statute there was such a right. Alternatively he argued that the wording of s 3(1)(h) of the Act was wide enough to bring his clients' claim for freight, extra expenses and return freight and for extra services rendered to the cargo within that item of claim. He referred me to *'The St Elefterio'*[3] in which case Willmer J held that not only was the wording of the corresponding provision in the English legislation 'wide enough to cover claims whether in contract or tort arising out of any agreement relating to the carriage of goods in a ship' but also that the provisions of the corresponding section to our s 4 (the one in contention was sub-s (4)) did not restrict the right to proceed in rem by requiring the plaintiff to prove at the outset of proceedings a cause of action sustainable in law.

Mr Sin whilst not conceding the point was prepared to proceed on the basis that the plaintiffs' claim came within s 3(1)(h) of the Act. I have already dealt with his argument earlier. However, I should mention that the further point Mr Sin made was that apart from the case of the *Cargo ex Argos*[7] there was no known case of a shipowner proceeding in rem against the cargo his ves-

sel had carried for unpaid freight. Perhaps the reason for this was that the shipowner had a possessory lien for the freight on the cargo he carried, and retained it while the cargo was in his possession, but once he parted with the possession of the cargo he lost his lien. This statement is borne out by an ancient scholar, Arthur Browne, who in 1802 in a course of lectures published under the title *A Compendious View of the Civil Law and of the law of Admiralty* said at Vol II p 82, and I quote it in the original text:

> As to freight, the mafter has a lien on the cargo while it remains in his hands, in which cafe he may retain it till his freight is paid; but it is faid, that if he once part with the poffeffion of the goods, he cannot afterwards retake them, or the produce thereof, by any admiralty or other procefs.

I must once again return to the case of the *Cargo ex Argos*[7] for in that case the cargo was in fact arrested for freight. The facts are stated in the headnote at p 134-135 of the report and I quote:

> The plaintiff's ship with a general cargo sailed from London for Havre with some petroleum on board. Under the bill of lading the plaintiff was to deliver the petroleum at Havre, and it was to be taken out by the defendant within twenty-four hours after arriving at Havre, or ten guineas a day was to be paid for demurrage. On the ship's arriving at Havre, the authorities of the port made the captain take her away in consequence of the petroleum being on board. Thereupon he went to neighbouring ports, but was not allowed to stay there. Returning to Havre, he discharged his general cargo, *and no bill of lading having been presented to him, and no application having been made to him for the delivery of the petroleum*, he brought it back to London. (Emphasis added.)

At p 139 of the report it is stated:

> Thereupon the plaintiff Gaudet instituted a suit in rem, under the admiralty jurisdiction of the City of London Court, against the barrels of petroleum, to recover what he claimed to be due.

After the Privy Council had dealt with the jurisdictional question to which I have referred to before the case was remitted to the Court of Admiralty for the plaintiff's claim to be tried. That was tried by Sir Robert Phillimore who gave judgment for the plaintiff. On appeal to the Privy Council the judgment was again delivered by Sir Montague E Smith who in dismissing the appeal said at p 159 of the report:

> The master, as a rule, is only bound to deliver cargo upon production of the bill of lading; and it is clear that freight may be earned before actual delivery, if the goods have been brought to the port of arrival ready to be delivered according to the bill of lading. The rule was stated in the judgment of the Court of Common Pleas, delivered by Willes J in *Dakin* v *Oxley* 15 CB (NS) 664 as follows: 'The true test of the right to freight is the question whether the service in respect of which freight was contracted to be paid has been substantially performed and according to the Law of England, as a rule, freight is earned by the carriage and arrival of the goods, ready to be delivered to the merchant.' Arrival, of course means 'at the destined port' as the next passage of the judgment explains.
>
> There is no doubt, in this case the goods were carried to the destined port, and the question is whether, when they had been brought to the port, the master was ready to deliver them there, if the merchant had been ready to perform his part of the contract by taking them from the ship.

Mr Sin sought to distinguish the case of the *Cargo ex Argos*[7] from the instant case in many respects. I do not think it necessary or desirable that I should comment on the case of the *Cargo ex Argos*[7] as I do not have to for present purposes decide whether cargo can be arrested for unpaid freight to bring the claim within the provisions of s 3(1)(h) of the Act. I accept the judgment of Willmer J in '*The St Elefterio*'[3] that the plaintiffs do not have to prove at this stage that their claim is sustainable in law so long as I am satisfied that the plaintiffs' claim is not frivolous or vexatious. It seems to me having regard to the case of the *Cargo ex Argos*[7] that circumstances can arise which make it permissible for a shipowner to arrest cargo carried on his ship for unpaid freight, notwithstanding the possessory lien which undoubtedly exists. Whether that is this case or not is another matter which will have to be decided at the trial, should this case go to trial. I therefore hold that the plaintiffs' claim as presently framed is not frivolous or vexatious at this stage of the proceedings at any rate.

That disposes of the first obstacle I referred to which the plaintiffs must surmount and I now turn to consider whether they can overcome the main argument for the defendants which is whether the possessory lien they have over the cargo (if their claim is well founded) could amount to a 'charge on ... property for the amount claimed' within the meaning of s 4(3) of the Act.

Mr Haridass Ajaib referred me to Hewson J's judgment of '*The Acrux*'[5] at p 331 of the report and urged me to accept it as being correct which I of course do. However, I think he misunderstands what Hewson J says. No doubt s 4(3) of the Act (the Englishs 3(3)) is procedural. It is procedural in the sense of the manner of invoking the in rem jurisdiction of the court provided of course the claim comes within one or other of the provisions of s 3(1) (the Englishs 1(1)). Section 3(1) of the Act defines the jurisdiction and the subsections of s 4 of the Act prescribe the manner in which that jurisdiction may be invoked. The subsections of s 4 of the Act cannot be ignored simply because they are procedural.

Mr Haridass Ajaib then sought to persuade me by a number of different arguments that the words 'or other charge on ... other property for the amount claimed' in s 4(3) of the Act, in a maritime context, must necessarily include any claim in the nature of a lien over the

cargo for freight. He urged that I should not be influenced by the judgments in *The St Merriel*[1] and *The Acrux*.[5]

In '*The St Merriel*'[1] the plaintiffs who had done some work on that ship which included owner's repairs issued writ in rem against the defendants, the owners of the vessel, claiming the cost of the owner's repairs. At all material times the vessel was chartered by demise. There was no contract with the defendants for carrying out the repairs, but apparently arrangements concerning repairs had been conducted between agents of the charterers and the plaintiffs. The defendants moved to set aside the writ on the grounds, among others, that the proceedings in rem were not allowable. Hewson J set aside the writ because, although the plaintiffs had at the time when the writ was issued a possessory lien (as distinct from a maritime lien) on the vessel, their rights and remedies did not amount to a charge within the meaning of the words 'other charge' in s 3(3) of the Act of 1956 (pari materia with s 4(3) of the Act). At p 542 of the report he said:

> It will be seen, therefore, that, although 'charge' is not defined in the Administration of Justice Act 1956, there exist in shipping statutes the very words 'a charge upon the ship'. In the absence of any direct words by the legislature which enlarge the meaning of 'other charge', I am not disposed to extend its meaning beyond the words which I find in the Merchant Shipping Acts to which I have been referred. Though I have much sympathy with the argument put forward so powerfully by counsel for the plaintiffs, I am not satisfied that the holder of a possessory lien has been put by this statute and to such a position that his rights and his remedies amount to a charge on the ship for the amount claimed. They certainly amount to an inconvenience, but, as I say, in the absence of express words such as 'other charge or right to possess by the holder of a possessory lien', or some other such words, I am not disposed to extend the meaning further than I have indicated. 'Other charge' seems to me to have some meaning based on statutes dealing with merchant shipping.

Three years later in '*The Acrux*'[5] the learned judge confirmed the view he had expressed in '*The St Merriel*'.[1] At p 331 of the report of '*The Acrux*'[5] he said:

> As to s 3(3), (our s 4(3)) that was considered in '*The St Merriel*', and there I found that 'other charge' was meant to refer to something which, though not within the restricted definition of a maritime lien, was, nevertheless, not as wide as any claim arising in connexion with the ship. In that case, the court was dealing with the right of the holder of a possessory lien under English law and it was not necessary to look at foreign law.

He then proceeded to deal with an aspect of foreign law which was material in '*The Acrux*'[5] but which is not material in this case.

All of Mr Haridass Ajaib's arguments on this point were directed to persuading me to give a wider meaning to the words 'other charge' by extending the meaning to include 'any claim' or 'other claim' albeit having a maritime connection. Hewson J was not disposed to. Nor am I. I am in total agreement with Hewson J that the words 'other charge' in the context in which they appear in s 4(3) of the Act could not have been meant to have as wide a meaning as 'any claim' or 'other claim'.

Mr Haridass Ajaib further argued that even if a limited meaning is to be given to the words 'other charge', the sections of Part VII of the Merchant Shipping Act (Cap 179, 1985 Ed) create a lien by statute and this is in the nature of 'other charge' over property for freight and other charges over goods. I fail to see this. No where in any one of the sections in Part VII of the Merchant Shipping Act is there to be found words which are capable of creating a 'charge' over the property discharged from a ship and placed in the custody of the wharfinger or warehouseman. All that s 263 of the Merchant Shipping Act does is to preserve the possessory lien for freight notwithstanding the discharge of the cargo from the ship. The wharfinger or warehouseman into whose custody the cargo is discharged stands in the place of the master/owner of the ship who held the lien. The possessory lien is preserved and transferred to the wharfinger or warehouseman. Section 264 deals with how that possessory lien is discharged, not by sale, but by payment of the amount claimed to be due. Section 266 provides for the sale. It will be noted that the sale is not in the exercise of any right or as a consequence of 'a charge' attached onto the goods but because no one has come forward to claim the goods. It will be seen from s 266(1) that the goods shall not be sold before the expiry of 90 days from the time the goods are placed in the custody of the wharfinger or warehouseman except where the goods are of a perishable nature and from s 266(2) that advertisement in two local newspapers and notice to the owner of the goods stated in cargo manifest, if known, are necessary prerequisites to the sale. Section 267 is also interesting as the freight and other charges are postponed to the payment of the rent and other charges to the wharfinger or warehouseman in respect of the goods.

I cannot find anything in the sections of Part VII of the Merchant Shipping Act which give any semblance to the possessory lien for freight, being anything more or less than a claim. To accede to this argument would in my view give a possessory lien the status of a maritime lien.

Mr Haridass Ajaib also submitted that it was wrong to look for the meaning of 'other charge' in the statutes dealing with merchant shipping since the Act also applies to aircraft. There is no substance in this argument.

It will be noted that there are only three instances where reference is made to aircraft in the Act. They are in s 3(1)(i), (j) and (k). Paragraph (i) deals with salvage of a ship which creates a maritime lien. By reference to

s 11 of the Air Navigation Act salvage to aircraft and their apparel and cargo is included. Paragraph (j) deals with towage and paragraph (k) with pilotage and aircraft is included in both these provisions. Towage and pilotage in relation to ships can in certain situations amount to salvage, a maritime lien. Maritime liens as recognized by our law (English law) and of their very nature and historically are things maritime, of the seas and ships. Perhaps the words 'or other charge on any ship, aircraft or other property for the amount claimed' were added to s 4(3) of the Act (in fact added to s 3(3) of the English 1956 Act as it is recognized that the Act was passed to bring Singapore in line with legal development in England in relation to admiralty matters (see *'Hoesheng'*[12] at p 182) to secure claims akin to a maritime lien in respect of aircraft and other property and in respect of ships to claims which under a foreign system of law is treated as carrying a maritime lien not recognized as a maritime lien by our courts. See *'The Acrux'*[5] at p 331E where Hewson J said: "other charge' in my view, means any charge on a vessel given under the law of any nation to secure claims similar to those recognized by this court as carrying a maritime lien such as wages, damage, salvage and bottomry'.

If I am right, then there will be no need to look at any statute dealing with merchant shipping to give meaning to 'other charge'. Thus this argument of the plaintiffs also fails.

'The equitable jurisdiction argument'. This was advanced as an argument of last resort. I was referred to *'The Conoco Britannia'*[13] and to the passage at p 554 of the judgment of Brandon J (as he then was) where the learned judge observed 'that the court can and must, when it is asked to do so, give all legal and equitable relief properly available to a party, either in proceedings in personam or in proceedings in rem'. It has been urged upon me that the equities are with the plaintiffs. I cannot agree. I have already commented on the conduct of the plaintiffs at the beginning of this judgment which I described as being less than forthright and that it put in doubt their professed honest and legitimate intentions.

The further exchanges of telexes between the defendants and Holman exhibited by Norio Minami does not make it any better for the plaintiffs. It will be remembered that the writ in these proceedings was filed on 27 August 1990 and the cargo arrested on 29 August after it had been discharged into warehouse. It will also be remembered that the plaintiffs' Singapore solicitors were acting on the instructions of Holman.

Despite numerous inquiries by the defendants for information as to where the cargo was stored in Singapore and for particulars of the plaintiffs' shipping agents in Singapore, Holman on 10 September 1990 merely referred the defendants to 'the court in Singapore' without giving them any of the information sought or that legal proceedings had been commenced in Singapore. I cannot believe that Holman were not fully aware of every move that was made in Singapore in respect of these proceedings and the cargo. On further inquiries being made, Holman referred the defendants to the plaintiffs' Singapore solicitors again without giving any information and without revealing the commencement of these proceedings (telex of 12 September 1990). Finally and following further telexes inquiring for the address of the warehouse where the cargo was stored and for the name and address of the plaintiffs' shipping agents so that the defendants could 'act accordingly' (telex of 19 September 1990) Holman replied on 2 October 1990 that they did not have the exact address of the warehouse where the cargo was stored when this information could have been easily ascertained by them. Still no disclosure was made of these proceedings.

I find the conduct of the plaintiffs/Holman unacceptable, the Gulf war and the United Nations sanctions nothwithstanding. The defendants were not given any opportunity at all to negotiate the additional charges the plaintiffs were claiming. It is axiomatic that he who comes to equity must come with clean hands. The plaintiffs do not come to this court with clean hands and accordingly I refuse to entertain the granting of any equitable relief.

For the reasons I have given I have no hesitation in coming to the conclusion that this court had no jurisdiction to entertain the plaintiffs' claim in these admiralty in rem proceedings. Accordingly I will set aside the writ, warrant of arrest, the order for sale and the judgment entered in these proceedings.

This really disposes of this case but I have been addressed on the procedural aspect of entering a judgment in default of appearance in admiralty proceedings in rem. As this is a matter of some importance I ought to deal with it.

Mr Sin points out that the affidavit leading to the signing of the judgment in default of appearance was made by the solicitor for the plaintiffs. It is not disputed that the affidavit for the purposes of entering judgment in default of appearance was made by Mr Haridass Ajaib, the solicitor for the plaintiffs. This is the affidavit verifying the facts on which the action is based which is required by O 70 r 20(3) of the Rules of the Supreme Court 1970.

The equivalent English rule is O 75 r 20(3). The note in the *1991 Supreme Court Practice* (White Book) under this r 75/21/3 reads as follows:

> It should be noted that before judgment in default can be obtained under this rule, the Court must 'be satisfied that

the applicant's claim is well founded'. It is therefore necessary for the applicant's case be properly proved.

The question is whether the applicant's case can be properly proved by an affidavit filed by someone other than the plaintiff or at least by someone who can have no personal knowledge of the facts and matters deposed to and who can only make the 'affidavit verifying the facts on which the action is based' on information and belief.

It should be noted that under the English procedure it is permissible for the affidavit verifying the facts on which the action is based to contain statements of information or belief, for the English O 75 r 32(7) provides: 'Unless the Court otherwise directs, an affidavit for the purposes of rule 19(4), 21 or 38(2) may, except in so far as it relates to the service of a writ, contain statements of information or belief with the source and grounds thereof'. I would emphasize the words 'Unless the Court otherwise directs'.

There is no equivalent to the English O 75 r 32(7) in the Rules of the Supreme Court 1970. The omission is I think deliberate. It has been pointed out to me that certain of the rules in the English O 75 have been reproduced in O 70 of the Rules of the Supreme Court 1970. For example the English O 75 r 30 is reproduced in O 70 r 29 of the Rules of the Supreme Court 1970; O 75 r 32(2) in O 70 r 30 and O 75 r 33 in O 70 r 31.

Be that as it may, O 41 r 5(1) and (2) of the Rules of the Supreme Court 1970 require that an affidavit may contain only such facts as the deponent is able of his own knowledge to prove, unless the affidavit is sworn for the purpose of being used in interlocutory proceedings. The only exceptions are applications filed for summary judgment under O 14 of the Rules of the Supreme Court and when ordered by the court.

A judgment entered in default of appearance under O 70 r 20(3) is a final judgment. It is not by any means an interlocutory proceeding or judgment. For the purposes of O 42 r 5(2) only those applications which do not decide the rights of the parties can be considered to be interlocutory. See *Rossage* v *Rossage*[14] and *Re J (an infant)*.[15]

An application to enter judgment in default of appearance under O 70 r 20(3) is intended to decide the rights of the parties and accordingly is not an interlocutory proceeding.

The rules of court must be strictly observed. They have not been in this case. It cannot be said that the plaintiffs have properly proved their case. The court has a discretion to set aside a judgment entered under this rule. See O 70 r 20(9) of the Rules of the Supreme Court. Having regard to all the circumstances of this case and being satisfied that the defendants have shown on affidavit that they have a good arguable case I would set aside the judgment entered in these proceedings on this ground as well.

The defendants are entitled to the costs of this application and I direct that they be taxed and paid.

*Application allowed.*

Solicitors: *Haridass Ho & Partners*; *Drew & Napier.*

Reported by *David Chong Gek Sian*

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## Ting Peng Yew v Singapore Envelopes Co Pte Ltd

HIGH COURT (SINGAPORE) — SUIT NO 2529 OF 1986
GOH JOON SENG J
7 JANUARY 1991

*Copyright — Infringement — Unauthorized reproduction of artwork — Value of artwork — Claim for loss of licence fee*

The plaintiff, an artist, claimed damages for infringement of copyright and loss of licence fee when the defendant distributed 350 table calendars containing unauthorized reproductions of the plaintiff's artworks. Interlocutory judgment was granted and damages in respect of licence fee were assessed at $62,385 based on one and a half times the $41,590 assessed value of the artworks. The defendant appealed against the assessment of damages. The plaintiff also cross-appealed against the assessed value of the artworks, and also claimed a licence fee at twice the value of the artworks.

**Held,** allowing the defendant's appeal and dismissing the plaintiff's cross-appeals:

(1) The plaintiff's assessment of the value of the artworks was based on prices offered for sale in Australia. However, none of the artworks were sold in Australia, and in fact were sold in Singapore at prices well below the posted prices. Based on the actual sales of some of the artworks in Singapore and on the plaintiff's own comparative pricing, the value of the 12 artworks was assessed at $15,000.

(2) As to the plaintiff's claim for damages at twice the value of the artworks, bearing in mind that only 350 copies of calendars were involved, a licence fee of one and a half times the value is more than reasonable. There is no reason why the rate should be any different due to the different artform.

(3) The defendant's appeal is allowed and the sum of $22,500 is awarded to the plaintiff by way of loss of licence fee, with interest at 6% per annum from the date of the filing of the writ. The plaintiff's cross-appeals are dismissed and the defendant is awarded costs of the appeal.

*Lok Vi Ming* for the plaintiff.
*Tan Hin Tat* for the defendant.

*Cur Adv Vult*

**Goh Joon Seng J**: The plaintiff is an artist and is the author of 12 pieces of artistic metal sculpture known as 'metalsculp'.